

1 EILEEN R. RIDLEY, CA Bar No. 151735
eridley@foley.com
2 EVAN L. HAMLING, CA Bar No. 339578
ehamling@foley.com
3 **FOLEY & LARDNER LLP**
555 CALIFORNIA STREET
SUITE 1700
4 SAN FRANCISCO, CA 94104-1520
TELEPHONE: 415.434.4484
5 FACSIMILE: 415.434.4507

6 SARA ALEXIS LEVINE ABARBANEL, CA Bar No. 324045
sabarbanel@foley.com
7 **FOLEY & LARDNER LLP**
11988 EL CAMINO REAL, SUITE 400
8 SAN DIEGO, CA 92130-2594
TELEPHONE: 858.847.6700
9 FACSIMILE: 858.792.6773

10 Attorneys for Defendants SAN
FRANCISCO ZEN CENTER, INC.;
11 SAN FRANCISCO EVERYDAY,
INC.; SAN FRANCISCO THIRD
12 WAY, INC.; THE ZEN
WAY, INC.; THE ZEN
FOUNDATION

13 [Additional Counsel listed on signature page]

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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 ALEXANDER BEHREND,
Plaintiff,
20 vs.
21 SAN FRANCISCO ZEN CENTER, INC.;
22 SAN FRANCISCO EVERYDAY, INC.; SAN
23 FRANCISCO THIRD WAY, INC.; THE ZEN
FOUNDATION,
24 Defendants.

25 Case No. 3:21-cv-01905-JSC

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27 **DISCOVERY DISPUTE JOINT**
28 **STATEMENT**

Hon. Jacqueline Scott Corley

1 Pursuant to the Court's Civil Standing Order, the Parties submit this Discovery Dispute
 2 Joint Statement concerning the Court's orders regarding the scope of discovery as it applies to
 3 the deposition of Seigen Johnson, noticed by Plaintiff (as well as other potential depositions to be
 4 taken in the matter). The Parties have met and conferred regarding the scope of discovery several
 5 times, and specifically about this deposition on September 8.

6 Defendants' Position: Per the Court's instructions regarding discovery at this time, the
 7 scope of discovery at this stage of litigation is limited to the narrow scope of Defendants'
 8 defense of the ministerial exception. (Order Re: Case Schedule [ECF 48]) Under the
 9 proportionality of Rule 26, discovery on this defense is limited to the elements of this defense:
 10 (1) is San Francisco Zen Center a religious institution marked by religious characteristics and (2)
 11 was Plaintiff a "minister"? *See, e.g., Shaliehsabou v. Hebrew Home of Greater Washington, Inc.,*
 12 363 F.3d 299, 310 (4th Cir. 2004); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.
 13 Ct. 2049, 2064 (2020). Plaintiff has repeatedly sought discovery of information that goes well
 14 beyond this scope.

15 Defendants seek clarification of the scope of discovery on the ministerial exception
 16 specifically due to Plaintiff's notice of deposition of non-party Ms. Seigen Johnson.¹ Aside from
 17 the fact that Plaintiff did not meet and confer regarding a deposition date as required by LR 30-1,
 18 taking Ms. Johnson's deposition runs far afield of the limited scope of discovery as described in
 19 the Court's Order, and it only serves to increase time and expense litigating a discrete issue in
 20 discovery that will not be resolved by taking that deposition. Ms. Johnson is not presently
 21 affiliated with Zen Center and is not a manager nor directly involved with the allegations
 22 asserted by Plaintiff in this action. She is not an expert on the ministerial exception, and in any
 23 event, Plaintiff has not noticed her as an expert witness. As the Court has already noted, subject
 24 to further clarification, discovery is limited to the ministerial exception. The deposition of a non-
 25 expert, non-party, unaffiliated witness, who did not work in a facility with Plaintiff, will not

26
 27 ¹ The Parties have jointly filed a separate discovery dispute statement on the issue of the scope of
 28 the ministerial exception more generally, which likely will inform this dispute as well.

1 answer the questions posed by the applicable case law including *Shaliehsabou* and *Morrissey-*
 2 *Berru*: is Zen Center a religious organization and was Plaintiff a “minister”?

3 Defendants seek to file a motion for protective order under FRCP 26(c) preventing the
 4 taking of Ms. Johnson’s deposition. However, because the informal discovery process outlined in
 5 the Court’s standing order allows the election of informal discovery for disputes involving non-
 6 parties, Defendants seek potential resolution of the issue of Ms. Johnson’s deposition along with
 7 clarification of the scope of discovery more broadly, without resorting to motion practice.

8 Plaintiff’s Position: Plaintiff’s written discovery and deposition requests, including the
 9 sole third-party Plaintiff has subpoenaed for deposition,² are narrowly tailored to rebut
 10 Defendants’ argument that the ministerial exception bars Plaintiff’s claims. Contrary to
 11 Defendants’ assertion that Plaintiff cannot proceed with his claim if the elements of the
 12 ministerial exception are met, the ministerial exception is an affirmative defense, not a
 13 jurisdictional bar. *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. E.E.O.C.*, 565 U.S.
 14 171, 194 (2012). It does not give religious institutions a general immunity from secular laws.
 15 *Our Lady*, 140 S. Ct. at 2060. Instead, the employer who asserts the ministerial exception as an
 16 affirmative defense has the burden of proving it with admissible evidence. *Hosanna-Tabor*, 565
 17 U.S. at 195 n.4. To successfully prove it, a defendant must show that a plaintiff (1) worked for a
 18 “religious institution” (2) as a “minister.” *Id.* at 188-89.

19 Whether an employee is a minister is a fact-intensive inquiry (*Our Lady*, 140 S. Ct. at
 20 2066-67) and there is no rigid formula for deciding when an employee qualifies as a minister
 21 (*Hosanna-Tabor*, 565 U.S. at 190). Courts have declined to extend the ministerial exception to
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23 ² Defendants suggest that Plaintiff failed to comply with L.R. 30-1, but Plaintiff provided
 24 Defendants with a copy of Ms. Johnson’s deposition subpoena on July 21, 2022, and Defendants
 25 have never previously raised the issue of the date with Plaintiff—a date that is and was
 26 negotiable. Despite Defendants waiting a month and a half to object to the deposition, Plaintiff
 27 has offered to meet and confer on the deposition date. *See First Resort, Inc. v. Herrera*, Case No.
 28 11-cv-5534-SBA (KAW), 2014 WL 589054, at *6 n.5 (N.D. Cal. Feb. 14, 2014) (“Given that the
 parties have met and conferred since the filing of the respective joint letter, the court considers
 [the plaintiff’s argument regarding the defendant’s failure to comply with Civil Local Rule 30-1]
 moot.”).

1 non-ordained employees, including an art teacher, *Palmer v. Liberty Univ., Inc.*, 2021 WL
 2 6201273, at *1 (W.D. Va. Dec. 1, 2021); an Associate Professor of Social Work, *DeWeese-Boyd*
 3 *v. Gordon Coll.*, 487 Mass. 31, 33, 163 N.E.3d 1000, 1002 (2021), *cert. denied*, 142 S. Ct. 952,
 4 212 L. Ed. 2d 227 (2022); and the Director of Student Life, *Tucker v. Faith Bible Chapel Int'l*,
 5 2020 WL 2526798, at *1 (D. Colo. May 18, 2020), *appeal dismissed*, 36 F.4th 1021 (10th Cir.
 6 2022). “What matters, at bottom, is what an employee does.” *Our Lady*, 140 S. Ct. at 2064.

7 Plaintiff’s discovery efforts are focused on obtaining discovery to rebut Defendants’
 8 assertion that Zen Center is a religious institution, and that Plaintiff was a “minister.” Ms.
 9 Johnson—a former senior staff member at Zen Center who worked at Zen Center with
 10 Plaintiff—has information relevant to this inquiry. Ms. Johnson may provide testimony
 11 regarding (1) whether Zen Center was a religious institution, (2) the process to become an
 12 ordained priest at Zen Center, (2) whether Work Practice Apprentices (“WPAs”) like Plaintiff
 13 were religious “students” who were on track to become ordained ministers, (3) the job
 14 responsibilities of employees at Zen Center, (4) whether work conflicted with, and took
 15 precedence over, religious ceremonies, and to what extent senior management prioritized work
 16 over ceremony, amongst other things. This information is highly relevant given Plaintiff’s need
 17 to rebut Defendants’ affirmative defense.

18 At bottom, Defendants’ objection to Ms. Johnson’s deposition—and their overarching
 19 objections to the scope of discovery—is a strategy to deny Plaintiff discovery of evidence that
 20 would support his case, leaving a record at summary judgment that would consist only of self-
 21 serving material Defendants have produced. Plaintiff welcomes guidance from the Court so that
 22 he may proceed with orderly discovery on topics relevant to rebutting Defendants’ affirmative
 23 defense without Defendants’ consistent stonewalling.

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1 DATED: September 19, 2022

FOLEY & LARDNER LLP
Eileen R. Ridley
Evan L. Hamling
Sara Alexis Levine Abarbanel

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/s/ Evan L. Hamling

Evan L. Hamling
Attorneys for Defendants SAN FRANCISCO ZEN
CENTER, INC.; SAN FRANCISCO EVERYDAY,
INC.; SAN FRANCISCO THIRD WAY, INC.; THE
ZEN FOUNDATION

9 DATED: September 19, 2022

10 By: */s/ Kyle P. Quackenbush*

11 Kyle P. Quackenbush (SBN 322401)
Mikaela M. Bock (SBN 335089)
Kimberly Macey (SBN 342019)
Scott Grzenczyk (SBN 279309)

12 **GIRARD SHARP LLP**

13 601 California Street, Suite 1400
San Francisco, CA 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846
kquackenbush@girardsharp.com
mbock@girardsharp.com
kmacey@girardsharp.com
scottg@girardsharp.com

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18 *Attorneys for Plaintiff Alexander Behrend*

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